

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION**

MENASHA CORPORATION	)	
1645 Bergstrom Road	)	
Neenah, WI 54956	)	Case No.
	)	
NEENAH-MENASHA SEWERAGE	)	
COMMISSION	)	
101 Garfield Avenue	)	
Menasha, WI 54954	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
JUSTICE	)	
Room B-103	)	
950 Pennsylvania Avenue, NW	)	
Washington, DC 20530-0001,	)	
	)	
Defendant.	)	

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**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. The defendant United States Department of Justice (“DOJ”), through the Environment and Natural Resources Division (“ENRD”), has violated the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), by failing to provide records responsive to properly-filed FOIA requests.

2. The Defendant has further violated FOIA by failing to adequately explain ENRD’s invocation of privilege to shield information from disclosure.

3. The Defendant has further violated FOIA by failing to respond to Plaintiffs' timely-filed administrative appeals; and by deliberately delaying such responses in an effort to discourage further pursuit by Plaintiffs of their requests.

4. Such failure to respond and deliberate delay in an effort to deprive the Plaintiffs of information to which Plaintiff is legally entitled constitutes arbitrary and capricious action under 5 U.S.C. § 552(a)(4)(F).

5. The Plaintiffs seek a judgment declaring Defendant to be in violation of FOIA on the aforementioned grounds; an order compelling Defendant to make all requested documents available to Plaintiffs within ten days; attorneys' fees; a written finding that the Defendant's failure to respond to Plaintiffs' properly filed administrative appeals raises questions as to whether agency personnel acted arbitrarily or capriciously with respect to the withholding of requested information; and such other relief as the Court deems proper.

### **PARTIES**

6. Plaintiff, Menasha Corporation ("Menasha"), is a Wisconsin corporation with its principal place of business in Neenah, Wisconsin and is the requestor of records which defendants are now withholding.

7. Plaintiff, Neenah-Menasha Sewerage Commission ("NMSC"), was created pursuant to Wis. Stat. §66.30 (1979) with offices located at 101 Garfield Avenue, Menasha, Wisconsin, and is a requestor of records which defendants are now withholding.

8. Defendant, DOJ, is an executive branch agency of the federal government and through the ENRD has possession or control of records that Plaintiffs seek in this action.

9. The Office of Information Policy ("OIP") is the division in DOJ that processes and handles administrative appeals of responses to FOIA requests directed to the ENRD.

## **JURISDICTION AND VENUE**

10. This court has jurisdiction over the action and venue is proper in the Eastern District of Wisconsin, pursuant to the statutory grant of jurisdiction at 5 U.S.C. § 552(a)(4)(B).

## **STATUTORY FRAMEWORK**

11. FOIA requires agencies of the federal government to release information to the public upon request, unless one of nine specific statutory exemptions applies. A fundamental tenet of FOIA is that “all documents are available to the public unless specifically exempted by the Act itself.” *Vaughn v. Rosen*, 484 F.2d. 820, 823 (D.C. Cir 1973).

12. An agency has twenty working days to respond to a FOIA request. 5 U.S.C. § 552(a)(6)(A). If the request is denied, the requester is entitled to appeal the determination within thirty days. FOIA requires the agency to make a determination with respect to a timely-filed appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A).

13. Although an agency may, upon notice to the requesting party, grant itself an extension of the aforementioned periods in "unusual circumstances," FOIA does not permit an agency to delay an initial response or an appeal determination for longer than ten days. 5 U.S.C. § 552(a)(6)(B).

14. A requester is deemed “to have exhausted his administrative remedies . . . if the agency fails to comply with the applicable time limit provisions" governing its response to a FOIA request or an appeal. 5 U.S.C. § 552(a)(6)(C).

15. A written finding by the Court determining that the circumstances surrounding the withholding of information responsive to a FOIA request raises “questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding” and provides a basis to trigger a Special Counsel proceeding to determine “whether disciplinary action is warranted

against the officer or employee who was primarily responsible for the withholding.” 5 U.S.C. § 552(a)(4)(F).

## **FACTUAL BACKGROUND**

### **DECEMBER 17, 2010 FOIA REQUEST TO THE UNITED STATES DEPARTMENT OF JUSTICE**

16. On December 17, 2010, Menasha, on behalf of itself and “Certain Defendants”,<sup>1</sup> including NMSC, served a FOIA request (“December 17 Request”) on ENRD seeking records<sup>2</sup> relating to the proposed consent decree filed on or about December 1, 2010 in *United States v. NCR Corp., et als.*, Case No. 10-910 (“Enforcement Litigation”), pending in the Eastern District of Wisconsin, Docket No. 31-1 (“Proposed Consent Decree”). A copy of the December 17 Request is attached hereto as Exhibit “A.”

17. The Proposed Consent Decree sought to settle the potential liability of Brown County, the City of Green Bay, and all federal agencies (“Settling Federal Agencies”), including the United States Army Corps of Engineers (“USACE”) and the United States Environmental Protection Agency (“EPA”) under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) at the Lower Fox River Superfund Site (“Site”). Under the terms of the Proposed Consent Decree, the Settling Federal Agencies would pay a total of \$4.5 million for a full and complete release of liability at the Site, or approximately three-tenths of a percent (0.3%) of the estimated \$1.5 billion in total response costs, natural resource damage assessment costs, and estimated natural resource damages otherwise being sought.

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<sup>1</sup> The “Certain Defendants” including Menasha, WTM I Company, P.H. Glatfelter, U.S. Paper, CBC/Riverside, the Neenah-Menasha Sewerage Commission, and the City of Appleton.

<sup>2</sup> For purposes of the request, the term “records” included but was not limited to documents, information, memoranda, letters, records of communications, telephone message slips and records, calendars, notes, data and analyses of data, computerized stored recordations, electronic data compilations, email, drawings, filed notes, interviews, photographs, images and calculations.

18. The Proposed Consent Decree was filed before any discovery has been taken as against the USACE, EPA, and other federal agencies that would explore and establish the appropriate share of liability otherwise attributable to the United States.<sup>3</sup>

19. On July 10, 2011, the United States and the State of Wisconsin filed a motion in the Enforcement Litigation seeking entry of the Proposed Consent Decree.

20. Menasha, on behalf of itself and the Certain Defendants, including NMSC, first sought the information necessary to evaluate the Proposed Consent Decree from counsel for the Environmental Enforcement Section (“EES”) in ENRD directly in a letter dated December 6, 2010. A copy of this letter is attached as Exhibit “B.” The urgency of receipt of the information was driven in large measure by the limited time provided to submit comments to the Proposed Consent Decree before the expiration of the public comment period. Based on conversations with counsel for EES, it was suggested that the information sought could be more quickly obtained through a FOIA request. Menasha, on behalf of itself and the Certain Defendants, including NMSC, thereafter issued the December 17 Request.

21. Specifically, the December 17 Request sought:

- a) All records relating to any correspondence and communications, whether oral or written, between ENRD and Brown County, the City of Green Bay (collectively Settling Defendants as defined in the Proposed Consent Decree), and the Setting Federal Agencies (as defined in the Proposed Consent Decree) (including their respective agents, consultants, contractors or attorneys) relating to the Proposed Consent Decree, including attachments or enclosures;
- b) All reports, models, modeling results and analyses, along with supporting records, received by ENRD from any party, including but not limited to the Settling Defendants or the Setting Federal Agencies or their respective

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<sup>3</sup> Menasha filed third-party claims against the USACE, EPA, and other federal agencies in 2009 in *Appleton Papers Inc. v. George A. Whiting Paper Co.*, Case No. 08-CV-00016-WCG, pending in the Eastern District of Wisconsin (“the Whiting Litigation”). However, in light of the Court’s phasing of the litigation in that matter, Menasha’s claims against the United States was stayed by agreement pursuant to a stipulation/and order of the Court dated March 30, 2010 (Whiting Dkt. 855). Discovery in the Enforcement Litigation, Case No. 10-910, has not yet started.

consultants, regarding discharges of material from the Consolidated Disposal Facilities (“CDFs”), as defined in the Proposed Consent Decree, and the location of these settled discharges;

- c) All reports, models, modeling results and analyses, along with supporting records, received by ENRD from any party, including but not limited to the Settling Defendants or the Settling Federal Agencies or their respective consultants, regarding discharges of sediments during dredging operations conducted by or on behalf of the United States Army Corps of Engineers in the Lower Fox River from at least 1951 to the present; and,
- d) All records or analyses, along with supporting records, or other information considered in arriving at the proposed terms of the settlement, including but not limited to, the proposed allocated share of liability and payment amounts for each Settling Defendant and the Settling Federal Agencies.

22. ENRD received the December 17 Request the same day, as was acknowledged on in a letter dated December 30, 2010 from Amber Blaha, Law and Policy Section, U.S. Department of Justice. A copy of Ms. Blaha’s letter is attached hereto as Exhibit “C.”

23. A telephone call with conducted between ENRD and Menasha on December 27, 2010 to discuss the December 17, Request. During that call, ENRD requested that Menasha narrow the December 17 Request. As a result of this call, Menasha, on behalf of itself and the Certain Defendants, including NMSC, agreed to narrow the December 17 Request to exclude production of documents that had already been produced during the course of the Whiting Litigation. ENRD also requested that the December 17 Request be narrowed to exclude communications between ENRD and various federal agencies, asserting that such communications would be covered by blanket claims of attorney/client privilege and coverage by the enforcement exemption under FOIA. Menasha, on behalf of itself and the Certain Defendants, including NMSC, would not agree to this request, noting that blanket claims of privilege are inappropriate under FOIA, and proposed instead that claims of privilege and/or exemption be handled on a document by document basis.

24. On January 18, 2011, ENRD made an interim response to the December 17 FOIA Request, and provided approximately 39,500 pages of responsive documents. A copy of the January 18, 2011 correspondence (“January 18 Response”) is attached as Exhibit “D.”

25. On February 7, 2011, ENRD supposedly completed its response to the December 17 FOIA Request, providing an additional 648 documents. USDOJ also informed Menasha and the Certain Defendants that it had:

- redacted 50 documents pursuant to Exemption 6 of FOIA;
- redacted one additional document pursuant to Exemption 5;
- withheld seven additional documents pursuant to Exemption 3; and,
- withheld 1,309 documents, asserting that these documents were exempt from FOIA under Exemptions 5 and 7(A).

A copy of ENRD’s February 7, 2011 correspondence (“February 7 Response”) is attached hereto as Exhibit “E.”

26. The February 7 Response provided no explanation or justification for ENRD’s invocations of privilege, nor any description of the withheld information, nor was any index provided that identified the types of documents, general content, who had prepared the documents, or with whom the documents had been shared. In short, ENRD provided no information that would allow any party to substantiate or evaluate the propriety of the withholding.

27. On April 7, 2011, counsel for Menasha, on behalf of itself and the Certain Defendants including NMSC, filed a FOIA administrative appeal (“Appeal of ENRD’s February 7 Response”) challenging the sufficiency of the February 7 Response on the grounds that, *inter alia*: ENRD failed to provide sufficient information about the withheld information or to justify its invocation of privilege; and ENRD improperly relied upon FOIA exemptions 3 (the “statutory

exemption”), 5 (the so-called “deliberative process privilege”), and 7(A) (the so-called “enforcement confidentiality privilege”). A copy of the Appeal of February 7 Response is attached as Exhibit “F.”

28. The OIP acknowledged the timely filing of the Appeal of ENRD’s February 7 Response on April 18, 2011. A copy of the OIP acknowledgement letter is attached as Exhibit “G.”

29. OIP failed to respond in any substantive manner whatsoever to the appeal within the 20 day response period mandated by 5 USC § 552(a)(6)(A)(ii).

30. OIP did not seek or obtain an extension of the 20 day response period applicable to the Appeal of ENRD’s February 7 Response.

31. The 20 day response period applicable to the Appeal of ENRD’s February 7 Response lapsed on or about April 28, 2011.

#### **COMMUNICATION REGARDING APPEALS OF THE FOIA REQUESTS TO OIP**

32. On May 3, 2011, counsel for Menasha placed a telephone call to OIP’s office and spoke with Ms. Angie Cecil, to confirm timely filing of the Appeal of ENRD’s February 7 Response and seek an explanation for OIP’s lack of response to the Appeal of ENRD’s February 7 Response, the statutory timeframe for which had by then expired. During that conversation, Ms. Cecil confirmed timely filing of Appeal of ENRD’s February 7 Response, and acknowledged that OIP had failed to respond within the required statutory period. She explained that FOIA appeals are handled on a “first in” basis, and that she would attend to the Appeal of ENRD’s February 7 Response as quickly as she could. She was not able to provide any estimate for when that might be.



33. On May 18, 2011, counsel for Menasha placed another call to Ms. Cecil to inquire as to the status of OIP's review of the Appeal of ENRD's February 7 Response. Ms. Cecil again noted that she had only just begun to review the appeal, and that she would provide a response as quickly as she could. She again was not able to provide any timeframe for when Menasha and the Certain Defendants could expect a response to the Appeal of ENRD's February 7 Response.

34. On or about June 23, 2011, counsel for Menasha placed another call to Ms. Cecil, during which Ms. Cecil advised that she had completed her review of the appeal, and had passed along her recommendations to her supervisor, Ken Courter.

35. On or about June 23, 2011, counsel for Menasha placed a telephone call to Mr. Courter, who advised that he was in the process of reviewing Ms. Cecil's recommendations, and that he would provide a response as quickly as he could. He, like Ms. Cecil, was not able to provide any timeframe for when Menasha and the Certain Defendants could expect a response to the Appeal of ENRD's February 7 Response.

36. On July 13, 2011, counsel for Menasha placed another call to Mr. Courter, who advised that he had completed his review, and passed his recommendations and those of Ms. Cecil on to the Associate Director of OIP, Janice McCloud. He could provide no estimate for when Ms. McCloud would complete her review.

37. On July 10, 2011, the United States and State of Wisconsin filed a motion in the Enforcement Litigation seeking entry of the Proposed Consent Decree. As a result, Menasha's, NMSC's, and the Certain Defendants time to prepare their opposition to the motion has begun to run. Menasha, NMSC, and the Certain Defendants believe that information that could support their opposition to the motion for entry exists within the documents that have been improperly withheld by ENRD.

## **CLAIMS FOR RELIEF**

### **COUNT I – ENRD**

38. By failing to provide all records responsive to the December 17 Request, failing to explain or substantiate its invocation of privilege, and casually disregarding its statutory obligation to respond to a timely-filed Appeal within 20 days, DOJ, through ENRD, has violated FOIA's mandate to release agency records to the public. 5 U.S.C. § 552(a)(6).

39. Menasha, NMSC, and the other Certain Defendants are entitled to production of the requested records immediately. Plaintiffs have a statutory right under the Freedom of Information Act to obtain the records that they seek from the DOJ, and there is no legal basis for DOJ's refusal to disclose them to Menasha, NMSC, and the other Certain Defendants or to provide a legally cognizable rationale for its refusal to do so.

39. On July 10, 2011, the United States and State of Wisconsin filed a motion in the Enforcement Litigation seeking entry of the Proposed Consent Decree. As a result, Menasha, NMSC, and the Certain Defendants time to prepare their opposition to the motion has begun to run. Menasha, NMSC, and the Certain Defendants believe that information that will support their opposition to the motion for entry exists within the documents that have been improperly withheld by DOJ. DOJ's failure to properly respond to the December 17 Request has prejudiced Menasha's, NMSC's, and the Certain Defendants' ability to oppose the pending motion for entry of the Proposed Consent Decree.

**WHEREFORE**, Plaintiffs respectfully requests the Court grant it the following relief:

- (a) A judgment declaring that the defendant United States Department of Justice, through the Environment and Natural Resources Division, and the Office of Information Policy, has violated FOIA by: failing to provide all documents

responsive to Plaintiffs' FOIA request; failing to adequately explain their invocation of privilege to shield information from disclosure; failing to respond to Plaintiffs' timely-filed administrative appeal; and deliberately delaying such responses in an effort to discourage further pursuit by Plaintiffs of their request.

- (b) An order requiring Defendant to make all requested records available to Plaintiffs within ten days;
- (c) An award to Plaintiffs of its costs and reasonable attorney's fees in this action;
- (d) A written finding that the circumstances surrounding Defendant's failure to provide requested information and failure to respond to Plaintiffs' properly-filed appeal raises questions as to whether Defendant's agency personnel acted arbitrarily or capriciously with respect to the withholding; and
- (e) Such other and further relief as this Court finds just and proper.

Dated: July 15, 2011

/s/David A. Rabbino

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